**STATE OF NEW JERSEY**
**OFFICE OF THE ATTORNEY GENERAL**
**DEPARTMENT OF LAW & PUBLIC SAFETY**
**DOCKET NO. EB13AB-66397**

| | | |
|---|---|---|
| Marisa Santoro, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | **Administrative Action** |
| | ) | |
| Meridian/Tilton Fitness & Wellness, | ) | **PARTIAL FINDING OF** |
| | ) | **PROBABLE CAUSE** |
| Respondent. | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |

On March 28, 2017, Marisa Santoro (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her employer, Meridian/Tilton Fitness & Wellness (Respondent), compensated her at a rate lower than similarly-situated, younger employees, and assigned her disproportionately fewer clients because of her age, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The DCR investigation found as follows.

## Summary of Investigation

Respondent, headquartered in Hazlet, is a members-only fitness center that operates seven locations in New Jersey. It provides services such as personal training, wellness programs, group classes, boxing lessons, and swimming lessons.

In or around August 2004, Respondent's predecessor, CanDo Fitness, hired Complainant as a part-time personal trainer at its Edgewater fitness center ("the gym"). On or about September 1, 2015, Respondent purchased the gym and retained its personal trainers, including Complainant. At all times relevant, Complainant reported to Respondent's Personal Training Manager Vincent Que (42 years old).

Complainant, who was 59 years old when she filed the instant charge, alleged that Respondent compensated her at a lower rate, and assigned her fewer new clients, than similarly-situated, younger, less senior personal trainers. Respondent denied the allegations.

**a. Differential Pay**

DCR's investigation found that Respondent employs "Master" and "Elite" personal trainers. Elite trainers are able to charge clients at a higher rate than Master trainers, effectively allowing Elite trainers to earn more income per training session than Master trainers. Each trainer's assigned rate varies by factors including experience, length of tenure, and skill set.

Complainant alleged that Respondent designated her as a Master trainer, while similarly-situated, younger, less senior personal trainers were designated as Elite trainers, who as a result, were able to charge clients at a higher rate and earn more income per training session than Complainant.

DCR's investigation did not support this allegation. The investigation found that out of 25 personal trainers working for Respondent during the relevant period, 22 were Master trainers and three were Elite trainers. According to Respondent, Complainant was one of the three Elite trainers. The other two Elite trainers were 41 years old and 35 years old, respectively.[1]

During a DCR fact-finding conference, Complainant stated that she was unaware that she was designated as an Elite trainer, or that she was able to charge a rate higher than her Master rate. She stated her belief that Respondent purposely withheld this information from her in an attempt to discriminate against her because of her age. To support her claim, Complainant provided what appears to be an undated list of Respondent's trainers, wherein she is identified as a Master trainer. Respondent denied knowledge of this list, and DCR was unable to determine whether Respondent prepared and/or disseminated this list.

DCR reviewed Complainant's personnel file and found that Respondent sent Complainant a letter dated December 23, 2015, which stated, in relevant part, "Consequently, effective January 1, 2016, your new PT session hourly rate will be $30 or $37 per personal training session based upon whether the session is charged as either Master or Elite."[2] Similarly, a "Personnel Change Form" identifies Complainant's rate information as, "$30/session Master (1hr)[;] $37/session Elite (1hr)[; and] $23.50/session ½ hr session." Complainant acknowledged receipt of this information by way of signature on December 31, 2015. During the DCR fact-finding conference, she confirmed that the signature was in fact hers.

DCR also reviewed the personnel files of all other personal trainers employed with Respondent during the relevant period, ages of whom ranged from 22-years-old to 60-years-old. Complainant was the second oldest personal trainer. The records revealed that 12 of Respondent's

[1] In correspondence to DCR, Respondent identified a 60-year-old personal trainer, W.S., as an Elite trainer. However, a review of W.S.'s personnel file suggests that W.S. was only able to charge his clients one rate, indicating that he was considered a Master trainer (see footnote 2).

[2] Elite trainers have the option of charging either their Elite rate or their Master rate. Master trainers can only charge their Master rate. During the DCR fact-finding conference, Que explained that Elite trainers are given the option to charge the Master rate because clients may balk at paying the Elite rate. In that scenario, in the interest of client retention, the trainer may offer his or her Master rate instead.

14 personal trainers under the age of 45 were assigned a rate lower than Complainant's $37 rate. Further, of Respondent's four personal trainers under the age of 30, three were assigned a rate of $24, $25, and $25, respectively, and one, like Complainant, was assigned a rate of $37. Moreover, out of the gym's 25 personal trainers, Complainant was assigned the fourth-highest rate.

Information obtained during the investigation was shared with Complainant and prior to the conclusion of the investigation, Complainant was given an opportunity to submit additional information to support her claims. No additional evidence was provided.

**b. Differential treatment - client assignments**

Complainant alleged that since September 2015 when Respondent acquired the gym, continuing through and beyond the time she filed the instant charge, Respondent assigned her a disproportionately low number of new clients in comparison to younger, less senior personal trainers. She further alleged that Que advised her in a private meeting between the two of them on or about March 11, 2016 that he would be instructing [redacted] to no longer assign Complainant new clients, and that she would be "phased out." She also alleged that Que one time called her "archaic and antiquated."

Respondent denied these allegations, stating in its answer that "Complainant's own self-imposed limitation on availability created an issue with her assignments." It explained that new client assignments are based on the trainer's availability during peak hours – i.e., Monday through Friday from 9 a.m. to 12 p.m. and 5 p.m. to 8 p.m., and Saturday and Sunday mornings – and that Complainant was rarely available during those times. Respondent told DCR that it was solely Complainant's lack of scheduled availability that accounted for her not being assigned new clients.

During the DCR fact-finding conference, Que denied advising Complainant that [redacted] would no longer be assigning her new clients or that she would be phased out. Que also stated during the DCR fact-finding conference that Respondent had no issues with Complainant's skill set nor her performance as a personal trainer. Complainant stated that no other witnesses were present when Que made either of these comments.

In correspondence to DCR, Respondent stated that new clients are scheduled for training sessions in one of two ways. Clients can either approach a personal trainer on the gym floor and request personal training services directly from the trainer, or they can contact a sales representative. If the new client chooses the latter option, the sales representative will assign the client a "Fit Plan" and schedule him or her to meet with [redacted]. [redacted] then matches the client with a personal trainer depending on the trainer's availability during the times in which the client prefers to train, whether the client prefers a male or female trainer, and specific training styles, techniques, specialties, and skills that fit the client's needs and goals. During the DCR fact-finding conference, Que estimated that 80% of new clients who sign up for personal training packages are obtained and scheduled directly by the trainers themselves and 20% are assigned and scheduled via [redacted]. Complainant disputed that [redacted] was responsible for only 20% of new client assignments, and Respondent was unable to produce any documents to support that figure.

Complainant acknowledged that she was a part-time trainer, but denied that her availability precluded [redacted] from assigning her new clients. She stated that she made herself available on Mondays for sessions beginning anywhere from 8 a.m. to 10 a.m. and 3:30 p.m. to 6:30 p.m.; Wednesdays for sessions beginning anywhere from 8 a.m. to 9 a.m. and 1:30 p.m. to 6:30 p.m.; Fridays for sessions beginning anywhere from 8 a.m. to 9 a.m. and 12:30 p.m. to 6:30 p.m.; and Saturdays for sessions beginning at 9 a.m. and beginning anywhere between 11 a.m. to 2 p.m. She argued that most of her available hours aligned with Respondent's peak hours – i.e., Monday through Friday from 9 a.m. to 12 p.m. and 5 p.m. to 8 p.m., and Saturday and Sunday mornings.

DCR's investigation revealed that as of late 2015 or early 2016, Respondent began using a scheduling application called "InTouch." Trainers log on to the InTouch program and modify their calendars to reflect their weekly availability. If [redacted] matches a new client with a trainer, she will schedule the new client on that trainer's InTouch calendar. A review of Complainant's InTouch records generally supported her statement with respect to her availability and its alignment with Respondent's peak hours.[3]

DCR also reviewed records with respect to the number of new clients that [redacted] assigned to part-time personal trainers between September 1, 2016 and August 31, 2017.[4] That review revealed that Complainant was not assigned a single new client during that period. A 54-year-old part-time personal trainer was assigned five new clients, and a 60-year-old part-time personal trainer was assigned four new clients. However, a 30-year-old part time personal trainer was assigned 10 new clients, a 33-year-old part-time personal trainer was assigned 15 new clients, a 45-year-old part-time personal trainer was assigned 15 new clients, and a 49-yearold part-time personal trainer was assigned 17 new clients. In addition, [redacted], 38 years old, appears to have assigned herself 12 new clients and Que four new clients.[5]

Some part-time personal trainers under the age of 50 who were employed throughout the relevant period were also not assigned any new clients, including a 26-year-old, a 37-year-old, a 39-year-old, and a 44-year-old. However, the context surrounding this is largely unknown, because Respondent was unable to produce InTouch records for any of its personal trainers, with the exception of Complainant. For example, had InTouch records revealed that these younger personal trainers were generally available during Respondent's peak hours, but were not assigned any new clients, that evidence might effectively bely Complainant's allegation of age discrimination. Alternatively, had InTouch records revealed that these younger personal trainers were *not* available during peak hours, such evidence may serve to support Complainant's allegation. However, as Respondent declined to produce these records, DCR is unable to draw any conclusions in this regard.

[3] Respondent produced some, but not all, of Complainant's InTouch records between October 2015 and April 2017. DCR requested the missing InTouch records. However, Respondent stated that "it has been unable to extract the requested information from the scheduling software," and that InTouch's "development team" has "been unable to assist in the extraction of this information."

[4] In correspondence to DCR, Respondent noted that these "new clients" are not necessarily new gym members. Rather, they may be existing members who decided they wanted to purchase or repurchase a personal training package.

[5] Two younger, full-time trainers were assigned 18 and 42 new clients, respectively, during the relevant period. However, because these two individuals were full time employees, DCR determined that they are not proper comparators to Complainant.

Moreover, much of the information produced by Respondent during the investigation was inconsistent, even at times contradicting information and records that it had previously produced. For example, Respondent initially provided DCR with a spreadsheet suggesting that it sold 65 personal training packages between September 1, 2016 and August 31, 2017. However, records provided at a later point during the investigation indicated that Respondent sold 151 personal training packages during that time. DCR was unable to obtain clarification from Respondent with respect to such inconsistencies because Respondent was largely uncooperative, and on multiple occasions, non-compliant, with DCR's requests for information.[6]

## Analysis

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief" that the LAD was violated. Ibid. If the Director determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if the Director finds there is no probable cause, then the finding is deemed a final agency order subject to review by the Appellate Division of the Supreme Court of New Jersey. N.J.A.C. 13:4- 10(e); R. 2:2-3(a)(2).

A finding of no probable cause is deemed a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. See N.J.A.C. 13:4-10(e); R. 2:2-3(a)(2). If, on the other hand, DCR determines that probable cause exists, then the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby DCR makes a threshold

[6] DCR's Rules of Practice and Procedure states that respondents must file responses to DCR's interrogatories within twenty (20) days following service of the interrogatories. N.J.A.C. 13:4-4.3. On October 27, 2017, DCR served a Supplemental Document & Information Request (SD&I) on Respondent. Respondent acknowledged receipt of the SD&I on that same date. Despite having not requested any extension of time, Respondent did not file its response until January 30, 2018. On August 14, 2018, DCR served a second SD&I on Respondent. Despite having not requested any extension of time, Respondent did not file its response until October 15, 2018, when it produced a package of roughly 300 unidentified documents without context and without providing responses to seven (7) of DCR's requested items as stated in the second SD&I. In an e-mail to DCR, counsel stated, "a more formal response will follow." After not hearing from Respondent for several months, DCR sent a letter to Respondent dated February 11, 2019, requesting fully responsive answers to the seven (7) requested items that Respondent previously failed to answer. Respondent did not provide the requested information within twenty (20) days and did not request an extension of time. On March 13, 2019, DCR sent a follow-up letter to Respondent, requesting that it provide its responses to the February 11, 2019 letter within seven (7) days. On March 19, 2019, Respondent sent DCR a letter requesting an additional fourteen (14) days to comply. DCR granted this request. However, after again not hearing from Respondent within the stipulated time frame, DCR sent Respondent a Notice of Default Proceedings on April 11, 2019, stating that if Respondent did not submit fully responsive answers within ten (10) days, DCR would initiate default proceedings. Only then, on April 18, 2019, did Respondent comply. Because of Respondent's persistent failure to adhere to DCR's Rules of Practice and Procedure, and in the interest of bringing this investigation to its conclusion without further unnecessary delay, DCR determined that further efforts made to obtain clarification from Respondent would ultimately prove unproductive.

determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Here, the investigation found insufficient evidence to support a reasonable suspicion that Respondent subjected Complainant to pay discrimination based on age. However, the investigation found sufficient evidence to support a reasonable suspicion that Respondent subjected Complainant to disparate treatment because of her age in failing to assign her new clients.

**a. Differential Pay**

The LAD makes it unlawful to discriminate against an employee in the compensation, terms, conditions, or privileges of employment based on age. N.J.S.A. 10:5-12(a).[7] To state a claim for pay discrimination under the LAD, Complainant must as a threshold matter demonstrate that Respondent paid her less than what it paid a person who was not a member of her protected class—here, younger trainers.

It appears that Respondent did not directly pay its trainers at all. Instead, the trainers were paid by their individual clients. However, even assuming without deciding that Complainant could maintain an equal pay claim against Respondent under these facts, evidence revealed during the investigation did not support Complainant's allegation that Respondent assigned her a rate per session that was less than younger, less senior personal trainers. Personnel records reviewed by DCR showed that Complainant was assigned the fourth highest rate per session out of 25 personal trainers. Moreover, 12 of 14 personal trainers under the age of 45 were assigned a rate lower than Complainant's $37 rate. And of Respondent's four personal trainers under 30 years old, three were assigned a rate of $24, $25, and $25, respectively, and one, like Complainant, was assigned a rate of $37.

Complainant's contention that Respondent intentionally failed to advise her that she could charge a $37 per session Elite rate is belied by the evidence. A review of Complainant's personnel file revealed that Complainant was advised via letter on December 23, 2015 that she could charge her clients at a $37 per session Elite rate. She acknowledged receipt of this information by way of signature on a Personnel Change Form on December 31, 2015.

The DCR investigation found no evidence, and none was produced by Complainant, to credit Complainant's allegation of age-based differential pay. Therefore, based on the investigation, the Director finds that there is **NO PROBABLE CAUSE** to support this allegation.

[7] On April 24, 2018, the Governor signed into law the Diane B. Allen Equal Pay Act, which amends the LAD to expand the State's equal pay protections. The Act went into effect on July 1, 2018. Because this complaint was filed before the Act went into effect, this disposition does not consider it.

**b. Differential treatment - client assignments**

As stated above, the LAD makes it unlawful to discriminate against an employee in the terms, conditions, or privileges of employment based on age. N.J.S.A. 10:5-12(a). In an age discrimination case, "[t]he focal question is not necessarily how old or young the claimant is, but rather whether the claimant's age, in any significant way, 'made a difference' in the treatment [s]he was accorded by [her] employer." Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div.), cert. denied, 170 N.J. 388 (2001). Under the LAD, a plaintiff must "show that age played a role in the decision making process and that it had a determinative influence on the outcome of that process." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 207 (1999). Here, the DCR investigation found sufficient evidence to credit Complainant's allegations that Respondent disproportionately assigned her fewer new clients because of her age.

Complainant established a prima facie disparate treatment claim based on age under the LAD, as she demonstrated that she received no new clients between September 1, 2016 and the date she filed the instant charge and thereafter, whereas younger part-time personal trainers were assigned new clients during that time period. See Peper v. Princeton University Board of Trustees, 77 N.J. 55, 84-85 (1978) (a complainant may establish a prima facie case under the LAD by showing that similarly situated employees outside the protected class received preferential treatment.)

Respondent provided what it alleges was its legitimate, non-discriminatory reason for why Complainant was not assigned new clients even when other younger part-time personal trainers were: she was not available during peak hours. However, the investigation found sufficient evidence to question the veracity of this articulated reason such that it may be a pretext for age discrimination. DCR's review of Complainant's InTouch records indicated that Complainant was indeed available to work during Respondent's stated peak hours. Specifically, Complainant was generally available to work on Monday, Wednesday, and Friday mornings and evenings, as well as Saturday mornings.

And the investigation revealed that trainers aged 55 or older were assigned far fewer new clients during the relevant period than trainers aged 30-49, which further suggests that Respondent's articulated reason was a pretext for age discrimination. Moreover, while the investigation revealed that some younger, part-time personal trainers were also not assigned any new clients within the relevant period, DCR was unable to investigate the circumstances surrounding that finding because Respondent was either unable, or unwilling, to produce those younger trainers' InTouch records for DCR's review.[8] Although there were no witnesses to the private meeting between Que and Complainant, the investigative findings are consistent with Complainant's report that during this meeting Que told her that she would no longer be assigned no clients and would be phased out. The veracity of Complainant's report of this conversation, and Que's denials, require a credibility determination following a plenary hearing.

[8] DCR finds it curious that Respondent was able to produce most of Complainant's InTouch records, but was unable to produce those records for any of its other personal trainers.

Accordingly, the Director is satisfied at this preliminary stage of the process that there is **PROBABLE CAUSE** to support Complainant's allegation of age-based differential treatment, and that this claim should "proceed to the next step on the road to an adjudication on the merits," Frank, supra, 228 N.J. Super. at 56.

Date: October 23, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights